IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 2ND APRIL 2007 / 12TH CHAITHRA 1929

Crl.Rev.Pet.No.1104 of 1999

CC.274/1996 of JUDL.MAGISTRATE OF FIRST CLASS, PALA
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REVN. PETITIONER/DEFACTO COMPLAINANT (CW1)

ARIVAH, S/O. AVIRAH, VERNALKUNNEL, VALAVOOR,
VALLICHIRA, PALA, KOTTAYAM.

BY ADV. SRI.M.J.THOMAS

RESPONDENTS/ACCUSED/STATE:
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1. ZACHARIAH @ JOY, S/O. JOSEPH, KUZHIKULATHIL VEEDU,
VALAVOOR, VALLICHIRA, PALA, KOTTAYAM.

2. TOMMY, S/O. JOSEPH, MUNJANATTU VEEDU,
VALLICHIRA, PALA, KOTTAYAM.

3. JOSEPH, S/O. SCARIA, KUZHIKULATHIL VEEDU,
VALAVOOR, VALLICHIRA, PALA, KOTTAYAM.

4. THE STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, KOCHI.

ADV. SRI.BABU JOSEPH KURUVATHAZHA FOR R1TO R3
SRI.BENNY JOSEPH KURUVATHAZHA FOR R1TO R3
PUBLIC PROSECUTOR SRI. C.K. SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRL. R.P. No.1104 OF 1999

Dated this the 2nd day of April, 2007.

O R D E R

This revision arises from an order of acquittal passed by Magistrate's Court. De facto complainant is the revision petitioner.

2. According to prosecution, accused committed offences under Sections 447, 341, 323, 324, 427 and 34 of Indian Penal Code. Respondents-accused 1 to 3 allegedly committed criminal tresspass into the property of PW1, committed mischief by destroying teak saplings, aanjily and coffee plants. He sustained a loss of Rs.500/-. When PWs 2 and 3 intervened, second accused stabbed PW2 with a chopper. First accused beat PW3 with an iron rod on her back and voluntarily caused hurt and also pelted stone. All of them sustained injuries.

3. Prosecution examined PWs 1 to 10 and marked Exhibits P1 to P3. On the side of accused, DW1 was examined. On an analysis of the evidence, court below found that the delay in lodging the complaint has not been explained. The incident occurred on 21.01.1996. But, a private complaint was filed only on the next month, ie. on 26.02.1996. There is a delay of above one month in filing the complaint. Trial court

sent the complaint for investigation under Section 156(3) of Code of Criminal Procedure (Code, for short) and thereafter Ext.P3 First Information Report was registered by police. The investigation commenced pursuant to registration of F.I.R and charge sheet was also laid for offences under Sections 447, 341, 323, 427 and 34 IPC. The trial court framed charges under Sections 447, 341, 323, 321, 427 and 34 IPC.

4. Heard the learned counsel for the petitioner. Learned counsel appearing for revision petitioner pointed out that trial court did not consider whether offence under Section 324 IPC is made out or not. On going through the judgment, I find that the trial court proceeded as if offence under Section 324 was not involved. In the judgment, no reference was made to offence under Section 324 IPC. The trial court only considered whether the prosecution succeeded in proving charge for other offences and not under Section 324.

5. On going through the records and particularly the formal charge framed in writing by the court below, I find that an offence under Section 324 IPC was prima facie involved. The court has not raised any point for consideration whether any of the accused committed the overt act to constitute offence under Section 324 IPC. Of course, some discussion is made in the judgment though it has not been specifically stated with reference to the section in the judgment.

In the discussion made, court referred to the weapons used in the offence, injuries etc.

6. One of the reasons for acquitting the accused is non-examination of doctor and failure on the part of prosecution to prove injuries. On a perusal of proceedings sheet, I find that the doctor was not summoned but no effort is seen taken by court in examining the doctor. When CW8 doctor was absent on 25.02.1999, summons was again issued. But, on the next posting date, when CW8 was absent, evidence is seen closed, without taking any coercive steps to get the presence of a doctor for examination. The court ought not to have closed the evidence without taking coercive steps to procure the presence of a doctor and make absence of such witness a ground to acquit the accused. The court committed a clear impropriety in closing the evidence, without taking any steps to procure the presence of a material witness and thereafter non-examination as a ground to acquit the accused.

7. It can also be seen that court below found that delay in filing the complaint has been fatal to prosecution. It was found that the delay is not explained. The trial court found that there are certain observations regarding suppression of original F.I. Statement. At the same time, it also observed that police did not register the crime. In paragraph 6, trial court also found that, if the allegation made by the

witness that a statement was recorded and that is true, police ought to have registered a crime and that is not seen produced in this case. The court does not appear to have applied its mind regarding alleged registration of earlier crime, suppression of such FIR etc. It is not decided whether F.I.R was actually registered earlier or not. In the absence of any registration of a crime earlier, there cannot be an earlier F.I.R and non-production of F.I.R cannot be said to be fatal to the prosecution case.

8. So what is to be ascertained is whether there is existence of an earlier statement and registration of a crime etc. Trial court committed an error in observing that there was suppression of F.I.R etc. even without confirming the fact that there was an 'earlier' FIR. It is relevant to note that in the complaint itself complainant had stated that police did not take any action nor register a crime or take any further action consequent to the recording of a statement from him. No witness stated that another crime was registered.

9. If, as a matter of fact, court is satisfied that another crime was registered, court ought not to have referred the case for investigation under Section 156(3) of the Code. On the other hand, court ought to have stayed the matter under Section 210 of the Code. But, the fact that the court sent it for investigation under Section 156(3) itself may indicate that the court was satisfied that

there was no registration of earlier crime or investigation into such crime. Taking all these facts into consideration, I find that the finding that an earlier F.I.R was registered and it was suppressed etc. is unsustainable in the absence of confirming whether FIR was registered earlier.

10. Another ground to acquit the accused is non-examination of doctor. The court can, even in the absence of medical evidence in fit cases, act upon the version given by witnesses if it is believable. The medical evidence can be looked into for corroboration if court finds that corroboration is necessary. But, in a case where medical records are available and relevant witnesses stated that they were examined by doctor, merely because doctor was not examined, court cannot hold that witnesses have not sustained any injury as alleged. The rejection of evidence given by ocular witnesses regarding sustaining of injury on the ground of mere non-examination of doctor was not proper.

11. There are other reasons as well to interfere with the order passed. But, I am not discussing the details since it is likely to prejudice any decision which will have to be taken in this case. Nobody appeared for accused. Accused and counsel were absent at the time of hearing. They do not appear to be interested in the matter.

In the above circumstances, I find that the order of acquittal is not sustainable and it is set aside. The case is remanded to the trial court for fresh consideration and disposal in accordance with law, after giving an opportunity to prosecution to adduce medical evidence.

This petition is allowed.

K. HEMA, JUDGE

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